Filed 1/13/09 P. v. Albarran CA4/1

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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. ODILON ALBARRAN, Defendant and Appellant.	D050959 (Super. Ct. No. SCD187650)

APPEAL from a judgment of the Superior Court of San Diego County, Frederick Maguire, Judge. Affirmed.

The record in this case shows that in the course of robbing a drug dealer, appellant Odilon Albarran killed the drug dealer by stabbing him 14 times. The jury convicted appellant of first degree murder and found he personally used a deadly weapon. We affirm.

Appellant asserts that during trial he was prejudiced by a number of procedural errors. None of those errors warrants reversal: contrary to appellant's argument on

appeal, the trial court adequately instructed the jury with respect to felony murder and specific intent. Given the issues appellant raised in cross-examining prosecution witnesses, the prosecutor did not act improperly in asking law enforcement witnesses about whether a witness was improperly coached. The prosecutor also acted properly in arguing, in response to contentions made by appellant's counsel, that police investigators did not set out with a preconceived notion about appellant's guilt and attempt to shape evidence to meet a predetermined result. The trial court cured any prejudice that may have occurred when a witness made an inadvertent reference to appellant's criminal record. A prosecution question about one witness's fear of appellant was proper, and there is no evidence the government acted in bad faith when a police detective inadvertently destroyed a recording of a witness interview.

In addition to his procedural contentions, appellant argues the prosecution failed to present sufficient evidence of a robbery such that appellant could be found guilty under the felony-murder rule and also failed to present evidence the murder was premeditated and deliberate. Our review of the record discloses ample evidence both of the robbery and appellant's premeditation.

The record also shows that appellant was properly advised of his *Miranda* rights, and the trial court therefore properly admitted appellant's custodial statements to police detectives. Finally, the trial court properly denied appellant's motion for a new trial. The disappearance of three exhibits from the jury room did not warrant a new trial. Their loss did not support appellant's request for an evidentiary hearing in which jurors would be examined under oath.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Prosecution Case*

A. *1991*

In 1991 Antonio Ayala (Tony) was running a drug business out of an apartment he shared with his wife Carolina Chavez and his brother Miguel Ayala (Miguel). Tony sold cocaine, rock cocaine and marijuana. Until the middle of 1991, Carolina's then-13-year-old daughter Veronica Chavez (Veronica) and another adult male, Oscar Aguirre, also lived in the apartment. Veronica and Aguirre were forced to leave the apartment after they became romantically involved. When they left the Ayala apartment, Veronica and Aguirre moved into an apartment with appellant.

After he left the Ayala apartment, Aguirre continued to have contact with Tony, and in the middle of September he bought a gun from Tony. While Tony was selling the gun to Aguirre, Tony was also counting his drug money. Carolina did not like Aguirre and told Tony that Aguirre could not be trusted.

About 10 p.m. on September 16, 1991, Aguirre's cousin stopped at the Ayala apartment and asked Miguel if he could obtain drugs on credit. Miguel, who usually slept by the front door so he could provide service to Tony's clientele, told the cousin he would "front" the cousin the drugs. Rather than taking the drugs, the cousin said he would come back for them and left. Thirty minutes later, someone knocked on the door. When Miguel opened it, he was confronted by two masked men, one of whom had a gun. As the two men forced their way into the apartment, one of the men told Miguel, "This is a holdup."

The shorter of the two robbers began trying to choke Miguel with a shoe lace. As this was occurring, Tony came out of the bedroom and began fighting with the other taller robber. Miguel was able to flip the shorter robber over his shoulder. The robber hit Miguel with his gun and then went into the kitchen, where he grabbed a knife. The shorter robber then began slashing Miguel, who was able to take the ski-mask off the shorter robber.

Eventually, because of the knife wounds he suffered, Miguel was no longer able to fight. The robber without the mask then turned his attention to Tony. He knifed Tony 14 times.

Carolina came into the living room and saw the unmasked shorter robber with something in his hand, hitting Tony; according to Carolina, at that point only the unmasked robber was fighting with Tony, who was bleeding profusely. The robbers fled the apartment, and Miguel saw them get into a white TransAm or sports car. According to Miguel, only the shorter robber knifed Tony, and, according to Carolina, only the shorter robber was fighting with Tony at the time she came into the room.

Carolina called police from a neighbor's apartment; while waiting for police and paramedics to arrive, Carolina instructed Miguel to gather up evidence of Tony's drug business and hide it. Miguel did so. Tony died at the scene. Miguel recovered from his wounds.

The forensic team that processed the apartment found blood everywhere in the apartment: "all over the walls, and window sills and carpet -- everywhere." The forensic team was able to recover two guns, two knives and a black ski mask from underneath a

mattress in Tony and Carolina's bedroom. Only one of the knives had any human blood on it.

According to Veronica, on the evening of the killing, appellant and Aguirre were talking about the fact they needed to go out and "do something." Veronica believed appellant and Aguirre were going to do something unusual because, unlike most times the men went out, on this occasion Veronica was not invited to go with them. Before they left, Veronica gave them a knife. After appellant and Aguirre left in Aguirre's white Camaro, Veronica watched a movie and fell asleep.

Veronica woke up when Aguirre returned to the apartment. Appellant was not with Aguirre, and in fact, even though appellant's belongings remained in the apartment, appellant never returned to the apartment. The following morning Veronica went with Aguirre to have his car detailed, and at trial Veronica recalled the detailers did a very thorough job of cleaning the car. Veronica did not see appellant again until the time of trial.

Elizabeth Escogido was 13 years old in 1991 and was a friend of Veronica. She also was a friend of appellant. After Tony's murder, Escogido never saw appellant again in San Diego. However, three or four days after the murder, appellant called Escogido and told her that he was in Los Angeles. Appellant asked Escogido if she heard about Tony's murder and told Escogido that he had some problems about money with Veronica's father and Veronica's father was "trying to get overly smart with him."

B. *2004*

Notwithstanding the evidence the forensic team was able to recover from the scene of the murder, the case went cold. In 2004 a cold case detective revisited the case. In 2004 a crime lab analyst was able to recover a DNA sample from the mouth area of the ski mask Miguel pulled off the robber who initially attacked him and eventually stabbed Tony to death. The DNA matched a sample appellant provided to a DNA data bank.

Appellant was charged with first degree murder, use of a deadly weapon in the commission of a murder and the special circumstance he murdered his victim in the commission of a felony. The jury found appellant guilty of those crimes and further found the special circumstance allegation was true.

DISCUSSION

I

In his first arguments on appeal, appellant contends the trial court erred in two respects in instructing the jury with respect to the felony murder special circumstance.

A. *CALCRIM No. 703 Was Not Required*

Although the trial court provided the jury with a version of CALCRIM No. 730 "Special Circumstances: Murder in Commission of Felony, Pen. Code, § 190.2(A)(17)," the trial court was not asked and did not give the jury CALCRIM No. 703 "Special Circustances: Intent Requirement for Accomplice After June 5, 1990−Felony Murder, Pen. Code, § 190.2(d)." In pertinent part, CALCRIM No. 703 states: "If the defendant was not the actual killer, then the People have the burden of proving beyond reasonable

doubt that (he/she) acted with either the intent to kill or with reckless indifference to human life and was a major participant in the crime for the special circumstance[s] of [section 190.2, subdivision (a)(17)(A)] to be true. If the People have not met this burden, you must find (this/these) special circumstance[s] (has/have) not been proved true [for that defendant]." The Bench Note to CALCRIM No. 703 states: "The court has a sua sponte duty to instruct the jury on the mental state required for accomplice liability when a special circumstance is charged and there is sufficient evidence to support the finding that the defendant was not the actual killer. [Citation.]"

As respondent points out, there was no evidence which suggested the taller robber, who remained masked, knifed Tony. According to Miguel, he unmasked the shorter robber, the shorter robber knifed Miguel until Miguel could no longer fight and the shorter robber then began knifing Tony. According to Miguel, only the shorter robber knifed Tony. According to Carolina, when she walked into the living room of the apartment, she saw Tony fighting with the shorter unmasked robber while the taller masked robber was fighting with Miguel.

Admittedly, Miguel and Carolina's recollection of the murder differ in that, according to Miguel, when the shorter robber stopped fighting with Miguel, he joined the other robber in attacking Tony, and, according to Carolina, she only saw the shorter robber fighting with the bloodied Tony. This variation in recollection does not assist appellant. Under neither version of events did the taller masked robber knife Tony. Moreover, contrary to appellant's suggestion the strong inference appellant was the actual killer, which was raised by the DNA found on the ski mask, was not undermined by the

fact that the forensic team found the mask beneath a mattress in the bedroom. In light of Miguel's apparent frantic effort to hide drug-related items before the police arrived, discovery of the mask in the bedroom beneath the mattress was not surprising.

In short, there was no factual basis upon which the jury could have concluded appellant was a mere accomplice who did not actually kill Tony. Thus there was no basis upon which the trial court was required to give CALCRIM No. 703. However, as respondent notes, even if the trial court erred in failing to give CALCRIM No. 703, the error was harmless. Significantly, as we have noted, the jury found appellant personally used a weapon in the commission of a crime. Because only one knife with blood on it was found in the apartment and only the shorter robber was identified as the robber who knifed Tony, the personal use finding is convincing proof the jury believed appellant was the actual killer. Thus, we have no doubt that even if the jury was given CALCRIM No. 703, the jury would have found appellant guilty of murder because plainly the jury did not believe appellant was merely an accomplice in Tony's murder. (See *People v. Jones* (2003) 30 Cal.4th 1084, 1120.)

B. *The Trial Court's Version of CALCRIM No. 730 Was Not Defective*

As appellant points out, "the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death." (*People v. Cavitt* (2004) 33 Cal.4th 187, 193.) Thus CALCRIM No. 730 in pertinent part states:

"The defendant is charged with the special circumstance of murder committed while engaged in the commission of [robbery] . . . .

"To prove that this special circumstance is true, the People must prove that:[¶] . . . [¶]

"[3. (4/5) The act causing the death and the [robbery] were part of one continuous transaction (;/.). . . .

"[AND

"(5/6) There was a logical connection between the act causing the death and the Robbery. *The connection between the fatal act and the [robbery]* must involve more than just their occurrence at the same time and place.]" (Italics added.) The last portion of CALCRIM No. 730 is derived from *People v. Cavitt, supra*, 33 Cal.4th at page 703 and is required when there is a factual dispute as to whether there is a causal connection between the underlying felony and the killing. (Use Note, CALCRIM No. 730.)

In giving CALCRIM No. 730, the trial court omitted the italicized phrase in the last paragraph, so that as read by the trial court the instruction required proof "there was a logical connection between the act causing the death and the robbery must involve more than just their occurrence at the same time and place." The written instruction given to the jury contained the same omission. Appellant contends the instruction, as given, was a "discombobulated sentence" and "[a]s a result of the defective instruction given in the instant case, the requirement for the causal relationship was set out, but the requirement for the temporal relationship was not."

The trial court's omission does not warrant reversal. First, there was no factual dispute at trial with respect to whether there was both a logical and temporal connection between the robbery and Tony's death. The unrebutted testimony showed Tony's death

occurred after masked robbers forced their way into his apartment and he and his brother attempted to defend themselves. This is not an instance where there was or could have been a claim Tony's death was unrelated to the robbery or occurred at a different time or place. (See *People v. Cavitt, supra*, 33 Cal.4th at p. 204.)

Where, as here, there is no dispute the victim's death occurred during the course of and as a result of the robbery, there is no requirement an instruction explicitly setting forth the requirement of a logical and temporal nexus be given. (*People v. Cavitt, supra*, 33 Cal.4th at p. 204.) "The existence of a logical nexus between the felony and the murder in the felony-murder context, like the relationship between the robbery and the murder in the context of the felony-murder special circumstance [citation], is not a separate element of the charged crime but, rather, a clarification of the scope of an element. [Citation.] '[T]he mere act of "clarifying" the scope of an element of a crime or special circumstance does not create a new and separate element of that crime or special circumstance.' [Citation.]" (*Id*. at pp. 203-204.)

"Hence, if the requisite nexus between the felony and the homicidal act is not at issue and the trial court has otherwise adequately explained the general principles of law requiring a determination whether the killing was committed in the perpetration of the felony, 'it is the defendant's obligation to request any clarifying or amplifying instructions on the subject.' [Citation.] 'Sua sponte instructions are required only' " 'on the general principles of law relevant to the issues *raised by the evidence*. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the *facts* before the court, and which are necessary for the jury's understanding of

the case.' " ' " [Citations.] In sum, there is no sua sponte duty to clarify the principles of the requisite relationship between the felony and the homicide without regard to whether the evidence supports such an instruction. [Citation.]" (*People v. Cavitt, supra*, 33 Cal.4th at p. 204.)

The *Cavitt* court's discussion of when a sua sponte duty to instruct on the issue of the connection between a felony and a killing arises is pertinent here because, as a practical matter, appellant contends the trial court had a sua sponte duty to give the unabridged version of CALCRIM No. 730. Although neither the prosecution nor the defense objected to the shortened version of CALCRIM No. 730 which the court gave both orally and in writing, appellant contends the trial court was required sua sponte to more fully instruct the jury about the connection that must exist between the robbery and the killing. As *Cavitt* illustrates, appellant is mistaken. Because there was no factual dispute as to whether Tony was killed during the commission of the robbery, the trial court was not required to give *any* instruction on the issue and hence its provision of an instruction which appellant contends was unintelligible did not materially affect the trial. (*People v. Cavitt, supra*, 33 Cal.4th at p. 204.)

Our unwillingness to find any material error here is buttressed by consideration of the well-established principle that " ' "[i]n determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]" ' " (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) In addition to the abridged version of CALCRIM No. 730,

the trial court gave the jury CALCRIM No. 540A, CALCRIM No. 540B, and CALCRIM No. 549. In CALCRIM No. 540A, the trial court instructed the jury it could find appellant guilty on a theory of felony murder, if the prosecution showed that "*[w]hile committing robbery*, the defendant did an act that caused the death of another person." (Italics added.) In CALCRIM No. 540B, the trial court instructed the jury it could also find appellant guilty on a felony murder theory if another person caused the victim's death while appellant aided and abetted the robbery so long as "*[w]hile committing* or [attempting to commit], a Robbery the perpetrator did an act that caused the death of another person." (Italics added.) CALCRIM No. 549 gave the jury a lengthy instruction on the necessity of showing under the felony-murder theory of murder and as a special circumstance that the killing and the robbery were part of one continuous transaction. "In order for the People to prove that the defendant is guilty of murder under a theory of felony murder and that the special circumstance of murder committed while engaged in the commission of robbery is true, the People must prove that the robbery and the act causing the death were part of one continuous transaction. The continuous transaction may occur over a period of time and in more than one location.

"In deciding whether the act causing the death and the felony were part of *one continuous transaction*, you may consider the following factors:

"1. Whether the felony and the fatal act occurred at the same place;

"2. The time period, if any, between the felony and the fatal act;

"3. Whether the fatal act was committed for the purpose of aiding the commission of the felony or escape after the felony;

"4. Whether the fatal act occurred after the felony but while [one or more of] the perpetrator[s] continued to exercise control over the person who was the target of the felony;

"5. Whether the fatal act occurred while the perpetrator[s] (were) fleeing from the scene of the felony or otherwise trying to prevent the discovery or reporting of the crime;

"6. Whether the felony was the direct cause of the death;

"AND

"7. Whether the death was a natural and probable consequence of the felony. It is not required that the People prove any one of these factors or any particular combination of these factors. The factors are given to assist you in deciding whether the fatal act and the felony were part of one continuous transaction."

Finally, the verdict form returned by jury stated: "And we further find the FIRST SPECIAL CIRCUMSTANCE that the murder of [Tony] was committed by defendant ODILON ALBARRAN, *while the said defendant was engaged in the commission and attempted commission of the crime of Robbery*, in violation of Penal Code section 211, within the meaning of Penal Code section 190.2(a)(17), to be: TRUE." (Italics added.) In light of the other instructions and the verdict form, it is simply not reasonable to conclude the jury was left with any erroneous impression as to what was required to find the felony murder special circumstance true.

In sum, there was no dispute the killing in this case occurred during the commission of a robbery, and the jury was fully advised about the need for a logical and temporal connection with the robbery. Given these circumstances, the trial court's

abbreviated version of CALCRIM No. 730 did not mislead the jury and does not warrant reversal. (See *People v. Cavitt, supra*, 33 Cal.4th at pp. 203-204.)

II

In addition to his contentions with respect to the felony-murder instructions, appellant contends the trial court erroneously instructed the jury with respect to the specific intent required for commission of murder and robbery. Without objection the trial court gave a version of CALCRIM No. 252 which stated, in pertinent part: "Every crime or other allegation charged in this case requires proof of the union, or joint operation, of act and wrongful intent.

"The following crimes and allegations require a specific intent or mental state: Premeditated Murder, Second Degree Murder & Robbery for Felony Murder, 1st degree. To be guilty of these offenses, a person must not only commit the prohibited act, but must do so intentionally or on purpose. *It is not required, however, that the person intend to break the law.* The act and the intent or mental state required are explained in the instruction for each crime or special circumstance." (Italics added.) The italicized sentence is not in the official version of the CALCRIM No. 252.

The trial court then went on to instruct the jury fully on the mental states required for commission of premeditated murder, second degree murder, robbery and felony murder.

Appellant contends the trial court erred in instructing the jury that a person need not intend to break the law to be guilty of the specific intent crimes of murder and robbery. Appellant is mistaken. Although Penal Code section 188 defines the express

malice needed for murder as the "deliberate intention unlawfully to take away the life of a fellow creature," there is no requirement the prosecution show a defendant charged with murder intended to act unlawfully. Penal Code section 188 itself provides in pertinent part: "Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice." As the court in *People v. Saille* (1991) 54 Cal.3d 1103, 1115, quoting *People v. Bobo* (1990) 229 Cal.App.3d 1417, 1441, stated: " 'The adverb "unlawfully" in the express malice definition means simply that there is no justification, excuse, or mitigation for the killing recognized by the law.' [Citation.]"

The same is true with respect to robbery. The specific intent required for robbery is the intent to permanently deprive the victim of his or her property. (CALCRIM No. 1600; see also *In re Albert A.* (1996) 47 Cal.App.4th 1004, 1007.) The prosecution is not required to also show that the defendant intended to act unlawfully, but only that the defendant took what he understood was the victim's property. (See *People v. Tufunga* (1999) 21 Cal.4th 935, 945-950.)[1]

Thus the trial court's instruction was an accurate statement of the law and one to which appellant neither objected nor suggested any amplifying or clarifying instruction. " 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested

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1 If the defendant believed he owned the property he took, that would be a defense to robbery and the defendant would be entitled to an instruction on that defense. (*People v. Tufunga, supra*, 21 Cal.4th at p. 957.)

appropriate clarifying or amplifying language.' " (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.) If appellant believed modification of the instruction as given was required, he was obligated to request it. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142.) Having failed to do so, he waived any objection. (*People v. Carrasco* (2006) 137 Cal.App.4th 1050, 1060-1061.)

Moreover, even if appellant had properly preserved an objection, it would have been without merit. As we noted in discussing CALCRIM No. 830, in determining whether jury instructions are correct, we consider the instructions as a whole. (*People v. Martin*, *supra,* 78 Cal.App.4th at p. 1111.) Here, the jury was fully instructed on the specific intent required for first and second degree murder, felony murder and robbery. Those instructions fully and unambiguously advised the jury as to the mental state required to find appellant guilty of murder and robbery, and thus instructing the jury that it need not find defendant intended to break the law would not have misled or confused the jury.

III

Next, appellant contends the prosecutor engaged in a number of acts of prosecutorial misconduct. We find no misconduct.

A. *The Prosecutor Did Not Improperly Vouch for the Credibility of any Police Officer*

In cross-examining Miguel, appellant's counsel strongly suggested the prosecutor, while interviewing Miguel before his preliminary hearing testimony, told Miguel to identify appellant as the robber who stabbed Tony to death after Miguel tore his mask off.

In response to the suggestion Miguel was coached to identify appellant, the prosecution presented testimony from a police detective and an investigator from the district attorney's office who were present during the interview. The detective and the investigator stated Miguel was never told to identify appellant but instead was repeatedly told to tell the truth. At one point the prosecutor asked the investigator if the investigator would ever permit such coaching of a witness to take place. The investigator stated he would not permit a witness to be coached.

During closing argument, appellant's attorney asserted appellant was innocent, the investigation started on a false premise which the investigators and the prosecutor were unwilling to abandon and the investigators told Miguel, " 'You gotta come and identify Mr. Albarran.' " Appellant's counsel also attacked Miguel's credibility and the credibility of the other prosecution witnesses. In particular, counsel stated: "[W]hat Detective Duran and Detective Baker have done in this case is wrong."

In his rebuttal argument, the prosecutor made the following statement: "Sometimes we hear bad things about out society. Sometimes, especially lately in the news, there are slams against our culture or the way we are. From the time this country was founded, people who worked in law enforcement didn't care who was murdered. To them, a murder was a murder. Sheriffs and marshals in this part of the country, when it was still being settled, they would go to the ends of the earth to find a murderer. They didn't care who the person was, who was murdered, or who the witnesses were. Well, these detectives and cops they have slammed so much did exactly that.[¶] . . . [¶]

"They didn't care that Tony Ayala was a drug dealer. They didn't care that the witnesses in this case would cause the accusations you have heard in this courtroom. They didn't care that these witnesses would put you through more than anybody ever should have to go through. They only cared -- these good people they insulted, they only cared about bringing a murderer to justice."

Appellant contends that in his questioning of the investigator and in his rebuttal argument, the prosecutor improperly vouched for the credibility of the members of law enforcement who testified at trial. Appellant misperceives the nature of improper vouching. Where, as here, a prosecutor has not suggested to the jury that he is aware of evidence outside the record which bolsters a witness's credibility, no misconduct has occurred. "It is misconduct for prosecutors to bolster their case 'by invoking their personal prestige, reputation, or depth of experience, or the prestige or reputation of their office, in support of it.' [Citation.] Similarly, it is misconduct 'to suggest that evidence available to the government, but not before the jury, corroborates the testimony of a witness.' [Citation.] The vice of such remarks is that they 'may be understood by jurors to permit them to avoid independently assessing witness credibility and to rely on the government's view of the evidence.' [Citation.] However, these limits do not preclude all comments regarding a witness's credibility. ' " '[A] prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom.' " ' [Citation.] '[S]o long as a prosecutor's assurances regarding the apparent honesty or reliability of prosecution witnesses are based on the 'facts of [the] record and

the inferences reasonably drawn therefrom, rather than any purported personal knowledge or belief,' her comments cannot be characterized as improper vouching.' " (*People v. Bonilla* (2007) 41 Cal.4th 313, 336-337.)

In *People v. Bonilla* the trial court found a prosecutor's statement, to the effect a witness was required to testify truthfully under the terms of a plea agreement, were proper. "The prosecutor's challenged remarks all fall within this wide latitude. The prosecutor read the contents of Keyes's plea agreement during each opening argument, but it was permissible to advise the jury of this information: ' "[W]hen an accomplice testifies for the prosecution, full disclosure of any agreement affecting the witness is required to ensure that the jury has a complete picture of the factors affecting the witness's credibility." ' [Citations.] His remaining remarks about Keyes's credibility during his two closing arguments were equally permissible. They fall into three categories: arguments that Keyes should be believed because he had an incentive to tell the truth under the terms of his plea agreement; arguments he should be believed because, despite extensive cross-examination, his preliminary hearing and trial testimony were consistent; and arguments he should be believed because other evidence in the record corroborated his testimony. These were arguments from the evidence, suggesting reasonable inferences the jury could draw that might lead it to credit Keyes's testimony. They did not suggest the prosecutor had personal knowledge of facts outside the record showing Keyes was telling the truth. Nothing in the challenged remarks invited the jury to abdicate its responsibility to independently evaluate for itself whether Brad Keyes should be believed. There was no prosecutorial misconduct." (*Id*. at pp. 337-338.)

As in *People v. Bonilla*, nothing in the prosecutor's remarks in this case suggested to the jury the prosecutor had special knowledge of facts outside the record which bolstered the officers' credibility or otherwise suggested to the jurors they should abandon their responsibility to judge the credibility of the witnesses for themselves. In this regard there is no dispute appellant's counsel forcefully impugned the integrity of the investigators and the prosecution's witnesses and in his questioning of the investigators the prosecutor did nothing more than give them a chance to directly refute the implication of defense counsel's questions. In doing so the prosecutor in no sense went outside the record or suggested the jury not determine the credibility of the investigators. When defense counsel again impugned the integrity of the investigators in his closing argument, in his rebuttal the prosecutor reminded the jurors that in fact the integrity of the prosecutors had been impugned. In addition to pointing out the insulting nature of counsel's argument, in the major thrust of his argument the prosecutor defended the officers by alluding to another undisputed fact: neither the victim nor the percipient witnesses led exemplary lives. From this fact the prosecutor asked the jury to conclude that rather than engaging in an unfair persecution of appellant, the prosecutors were instead simply attempting to obtain justice for Miguel, notwithstanding Miguel's criminal lifestyle and the criminal lifestyle of his brother and wife. In essentially asserting the investigators were dedicated public servants attempting to achieve justice, the prosecutor did nothing improper: he did not refer to anything that was outside the record or the common knowledge of the jurors, and he did not attempt to relieve the jurors of their duty to judge the credibility of the witnesses.

B. *A Witness's Improper Reference to a Government DNA Database was Cured*

In support of its case, the prosecution called a police detective to testify about, among other matters, CODIS, a DNA database operated by the California Department of Justice. On direct examination, the detective stated: "Basically, it's a large database of D.N.A. profiles of convicted felons." Appellant's counsel objected and asked for a sidebar. Before excusing the jury and conducting the sidebar, the trial court instructed the jury to disregard the detective's remark. At the side bar, appellant's counsel moved for a mistrial. Before ruling on the mistrial, the trial court excused the jury for the day and gave the jury an additional instruction with respect to the detective's description of the CODIS data base: "Folks, look, I mentioned that you have to disregard the previous comment. I will order that you do disregard the previous comment. Additionally, I have to state, as I had in the instruction and so forth, the jury decides the case only on the evidence presented. And the only evidence presented in this case is that there is one person who has a criminal background, and that's [Carolina], okay?"

After listening to further argument from counsel, the trial court denied the motion for a mistrial and counsel's alternative suggestion the court declare a mistrial on its own motion. When the trial resumed, the trial court gave the jury another curative instruction.

On appeal, appellant argues the detective's statement about the CODIS system was so prejudicial that it could not be cured and the trial court should have granted his motion for mistrial or in the alternative a new trial. We find no error.

Plainly, the detective's reference to the DNA of convicted felons in the CODIS data base was improper. Prior to trial, the parties agreed prosecution witnesses would not make any reference to the origins of the CODIS data base, and the trial court advised the parties their agreement would be treated as an in limine ruling excluding such references. As appellant points out, "[a] prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement. [Citation.]" (*People v. Warren* (1988) 45 Cal.3d 471, 481-482.)

The question presented here is whether the investigator's reference to felons in the CODIS system was so prejudicial that we must reverse appellant's conviction. (See *People v. Warren, supra,* 45 Cal.3d at pp. 481-483; see also *People v. Schiers* (1971) 19 Cal.App.3d 102, 111-114; *People v. Glass* (1975) 44 Cal.App.3d 772, 781-782.) As respondent points out, we of course must presume the jury obeyed the trial court's admonition that it disregard the investigator's comment. (See *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17.) Nonetheless in some circumstances, improperly introduced evidence may be so prejudicial and the case may be so close that an admonition may not be sufficient to protect a defendant's right to a fair trial. (See *People v. Schiers, supra,* 19 Cal.Ap.3d at pp. 111-114; *People v. Glass, supra*, 44 Cal.App.3d at pp. 781-782.) Here, our review of the case persuades us that although the reference was certainly prejudicial, given the context in which it occurred and the other evidence of appellant's guilt, the trial court's instructions were sufficient to prevent undue prejudice.

We agree with appellant that by indirectly suggesting appellant was a felon, the investigator's explanation of the CODIS system was a serious mistake and in other factual contexts it might require a new trial. Here, however, two sets of circumstances substantially mitigate the nature of any harm. First, the record is quite clear that at the time of the murder appellant was associating with criminals. Indeed, at the time of the murder appellant was living with Aguirre and his 13-year-old girlfriend. As we noted, Aguirre and his girlfriend moved in to appellant's apartment after leaving Tony's apartment and the drug business Tony was operating there. Given this evidence about appellant's lifestyle, the jury would not have been shocked or surprised to learn appellant himself had a criminal record. Second, the evidence of appellant's guilt was quite powerful. Although the eyewitnesses were confronted at trial with inconsistent statements they made shortly after the killing, the DNA evidence the prosecution presented, along with the undisputed fact that appellant never returned to his apartment after the killing, were convincing evidence of his guilt. In short, given appellant's lifestyle at the time of the killing and the other evidence of his guilt, this is not the sort of unusual situation in which we would question the jury's ability to follow the trial court's direction and consider only the properly admitted evidence. Thus the detective's inadvertent statement did not require a mistrial.

C. *The Prosecutor Did Not Improperly Elicit Testimony About Miguel's Fear*

In prior court hearings and in discussing the case with investigator's shortly before the trial, Miguel identified appellant as the shorter robber who knifed his brother. However, when Miguel took the stand he gave the following testimony:

"Q. Did there come a time during the struggle where you able to remove the ski mask from the person you were fighting with?

"A. Yes. I did take it off.

"Q. And keeping in mind you are under oath and to be truthful --

"A. Yes.

"Q. Do you see that person in court today?

"A. No. No.

"Q. Are you saying that that isn't the person, or that do you not remember?

"A. No. The person that committed the crime is not here."

In an effort to rehabilitate Miguel, the prosecutor then asked the following questions:

"Q. Sir, did you previously identify this person in court as the individual that you saw when the ski mask was removed?

"A. Yes. Yes.[¶] . . . [¶]

"Q. Were you interviewed last week by the detectives in this particular case?

"A. Yes.

"Q. And did you tell the detectives that interviewed you that you were positive the person you saw in court was the one you took the ski mask off of?

"A. Yes."

The prosecutor then asked Miguel the following question: "Q. Have you previously told the detectives that you were concerned that your mother was worried for you safety?"

Appellant's counsel then objected on the grounds that by way of the parties' pre-trial stipulation, the prosecution agreed not to ask about any witness's fear of testifying. At a lengthy sidebar, the trial court overrruled the objection and found that notwithstanding any agreement the prosecution may have made, in light of Miguel's inability to identify appellant, the prosecution would be permitted to ask him about his mother's fear for his safety. Although appellant's objection was overruled, when the sidebar was completed the prosecutor did not attempt to elicit a response to his question. On appeal appellant contends the prosecutor was guilty of misconduct in asking Miguel about his mother's concerns. We find no misconduct.

Plainly, had the prosecution been aware of Miguel's difficulty in making an identification at trial, it never would have entered into a stipulation limiting its ability to explain Miguels' changed testimony. (See Evid. Code, § 785, permitting a party to impeach its own witness.) In particular we note that " '[e]vidence a witness is afraid to testify is relevant to the credibility of that witness and is therefore admissible. . . .' " (*People v. Olguin* (1994) 31 Cal.App.4th 1355, 1368.) Thus, although the face of the pretrial stipulation would have barred any reference to Miguel's fears, in light of Miguel's

inability to identify appellant in court, the trial court acted well within its discretion in effectively relieving the prosecution of its obligations under the terms of the stipulation and permitting the prosecution to elicit otherwise admissible testimony.

D. *Lost Tape*

Prior to trial a police detective interviewed Elizabeth Escogido. The interview was conducted in Spanish and recorded on a videotape. At a pre-trial hearing the prosecutor disclosed the tape was lost. Appellant moved that testimony from Escogido be excluded. The trial court conducted an evidentiary hearing in which a paralegal from the district attorney's office and the police detective who conducted the interview testified. The paralegal testified that during the investigation he was given custody of the tape, along with five other tapes, and that he copied the five other tapes. The paralegal testified he did not copy the Escogido tape but instead returned it to the police detective so the detective could provide an English translation. According to the police detective, he could not locate the Escogido tape in his desk and believed he may have destroyed the tape when he left the homicide unit in 2005. The detective explained that when moving he would have destroyed any tapes he found in his desk because he erroneously believed they had all been copied. Following the evidentiary hearing, the trial court found the loss of the tape was inadevertent and denied the motion to exclude testimony from Escogido. As we noted previously, Escogido testified at trial that shortly after Tony was killed appellant called her, asked her if she had heard about Tony's murder and told her Tony got smart with him over some money.

Contrary to appellant's argument, the loss of the Escogido tape did not deprive him of a fair trial. A due process violation occurs when, acting in bad faith, the government fails to preserve evidence which possesses apparent exculpatory value and is of such a nature that the defendant is not likely to obtain comparable evidence by other reasonably available means. (*Arizona v. Youngblood* (1988) 488 U.S. 51, 58 [109 S.Ct. 333]; *California v. Trombetta* (1984) 467 U.S. 479, 489 [104 S.Ct. 2528]; *People v. Frye* (1998) 18 Cal.4th 894, 942-943.) Importantly, "a trial court's inquiry whether evidence was destroyed in good faith or bad faith is essentially factual: therefore, the proper standard of review is substantial evidence." (*People v. Memro* (1995) 11 Cal.4th 786, 831.) Here, the trial court could reasonably accept the testimony of the paralegal and the detective that the tape was inadvertently destroyed because the detective erroneously assumed it had been copied. Thus the trial court's conclusion the government acted in good faith and no due process violation occurred is fully supported by the record.

E. *Cumulative Error*

Finally, appellant contends that even if no single instance of what he believes was prosecutorial misconduct requires reversal, the cumulative impact of prosecutorial mistakes warrants reversal. (See *People v. Hill* (1998) 17 Cal.4th 800, 844-848.) The central problem we have with appellant's argument is, contrary to his contention on appeal, the prosecutor was not guilty of numerous instances of misconduct. The only intrusion on appellant's rights which occurred was the detective's inadvertent reference to felons in the CODIS database, which we have determined did not cause undue prejudice.

Thus, we reject appellant's contention the judgment should be reversed because of any cumulative prejudice.

IV

Appellant next contends there was insufficient evidence he was guilty of robbery or attempted robbery and insufficient evidence he premeditated Tony's murder. Neither argument is persuasive.

A. *Sufficiency of the Evidence*

"In reviewing a challenge to the sufficiency of evidence, the reviewing court must determine from the entire record whether a reasonable trier of fact could have found that the prosecution sustained its burden of proof beyond a reasonable doubt. In making this determination, the reviewing court must consider the evidence in a light most favorable to the judgment and presume the existence of every fact the trier could reasonably deduce from the evidence in support of the judgment. The test is whether substantial evidence supports the decision, not whether the evidence proves guilt beyond a reasonable doubt. [Citations.]" (*People v. Mincey* (1992) 2 Cal.4th 408, 432.)

B. *Robbery*

Tony was a drug dealer who kept money and drugs at his apartment. According to Miguel, on the evening of the murder, two men barged into his brother's apartment, both men were wearing ski masks, one was brandishing a gun and one said, "This is a hold up." Contrary to appellant's argument, in order to establish a robbery the prosecution was not required to establish any more specific request for money on the part of the robbers. Moreover, this is not an instance, such as occurred in *People v. Thompson* (1980) 27

Cal.3d 303, 311-312, where the perpetrator plainly entered the victims' residence with an intent to kill rather than rob the victims. Instead, given the drugs and money Tony was known to keep in his apartment and the conduct of the invaders, the jury could reasonably conclude the overall purpose of the invasion was robbery.

C. *Premeditation*

" 'Generally, there are three categories of evidence that are sufficient to sustain a premeditated and deliberate murder: evidence of planning, motive, and method. [Citations.] When evidence of all three categories is not present, "we require either very strong evidence of planning, or some evidence of motive in conjunction with planning or a deliberate manner of killing." [Citation.] But these categories of evidence, taken from *People v. Anderson* (1968) 70 Cal.2d 15, 26-27, "are descriptive, not normative." [Citation.] *They are simply an "aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse."* [Citation.]' " (*People v. Elliot* (2005) 37 Cal.4th 453, 470-471.) Importantly, " '[t]he process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ." [Citations.]' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

Here the record shows that appellant appeared at a drug dealer's apartment with an accomplice armed and masked. The record further shows that during the struggle with

Miguel, appellant went into the kitchen and found a knife, with which he then inflicted disabling wounds on Miguel and deadly wounds on Tony. Given these circumstances, the jury could reasonably have concluded appellant went to the apartment fully prepared to kill Miguel and Tony and upon meeting resistance from the Ayala brothers, appellant quickly determined that he would in fact kill the brothers to avoid detection or retaliation. Although not a great deal of time elapsed, in light of the evidence appellant was prepared for violence even before he entered the apartment, these circumstances were sufficient to support a finding that during the course of the robbery appellant made a cold and calculated judgment he had to kill both Miguel and Tony.

V

Next, appellant contends he was given a confusing *Miranda* warning in Spanish and the trial court should have excluded statements he made to a police detective denying that he knew Tony, Escogido, any person named Oscar, or that he ever lived in San Diego. We find no error.

The trial court found the detective read the *Miranda* warning in Spanish from the form provided to the detective by the police department. That warning fully satisfies the requirements of *Miranda v. Arizona* (1966) 384 U.S. 436. Admittedly, before the detective actually gave the *Miranda* warning, the detective gave appellant a somewhat confusing explanation of what he was about to do. The detective told appellant: "After I read you your rights, if -- you have a right that if I don't want to talk, I don't want to talk." Like the trial court, we find this less than clear preamble to the *Miranda* warning which the detective gave did not render the actual warning appellant received ineffective in any

respect. As given, the warnings appellant received fully conveyed to appellant his rights as required by *Miranda*. (See *People v. Wash* (1993) 6 Cal.4th 215, 236-237.) Thus the trial court did not err in admitting the statements appellant thereafter made to the detective. (*Ibid*.)

VI

After the jury returned its verdict, the trial court discovered three trial exhibits were missing. The exhibits, Nos. 38, 39 and 40, consisted of two photo lineups and a transcript of an interview of Tony's wife Veronica. The trial court's bailiff was prepared to testify the exhibits went into the deliberation room with the jury. The bailiff was also prepared to testify that after the jury left, the deliberation room was a mess, "a lot of papers all over the place; a lot of papers in the trash." In response to this information, appellant asked the trial court to question each juror with respect to the whereabouts of the missing exhibits or in the alternative release information with respect to the identity of the jurors so they might be questioned. The trial court denied both requests and in addition treated the requests as a motion for a new trial, which it also denied.

We review the trial court's denial of appellant's request for hearing on the issue of jury misconduct, for jury information, and his motion for a new trial for abuse of discretion. (*People v. Jones* (1998) 17 Cal.4th 279, 317; see also *People v. Osband* (1996) 13 Cal.4th 622, 675-676; *People v. Clair* (1992) 2 Cal.4th 629, 667.) Here, nothing in the record suggests the jury was guilty of any misconduct. Given the circumstances which the bailiff discovered after the jury left the deliberation room, the trial court could reasonably conclude court personnel inadvertently disposed of the

entirely documentary exhibits after the jury finished its deliberations. This conclusion is buttressed by the fact that during the trial the jurors did not ask for the exhibits or otherwise indicate the exhibits were missing before the jury's deliberations were concluded. As appellant concedes, if, as the record suggests, the exhibits were not lost until after the verdict was returned, appellant was not prejudiced in any manner by the loss of the exhibits. Because the record fully supports the conclusion no jury misconduct occurred, the trial did not abuse its discretion in denying appellant's motion for an evidentiary hearing, for jury information or for a new trial. (See *People v. Osband, supra*, 13 Cal.4th at pp. 675-676.)

Judgment affirmed.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

IRION, J.